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**Pretrial Procedure in a Bankruptcy Proceeding**

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## INTRODUCTION

Pre-trial procedure in bankruptcy court may seem complex. It surely requires attention to detail in order to comply with all deadlines and to satisfy all other requirements. An attorney preparing for trial in bankruptcy court must carefully comb through the judge's pre-trial order and any amendments. Missing a deadline or ignoring a judge's instructions not only can make an attorney "look bad," but it can also have severe consequences. In addition to the judge's pretrial order, multiple procedural rules apply in bankruptcy court, including the Local Bankruptcy Rules of Procedure, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure, the Federal Rules of Evidence and, at times, the Local Rules for the District of New Hampshire. For these reasons, a detailed understanding of the judge's order, all of the applicable rules, and how they interrelate is essential.

## COMPLYING WITH DEADLINES AND COMPUTATION OF TIME

Not only is substantive knowledge of your case vital, but knowing the rules regarding deadlines is necessary to avoid harmful consequences. As an initial matter, parties should take heed of Bankruptcy Rule 9006, which governs the computation of time periods specified by the Court. Parties should be particularly aware that when the last day of a given period falls on a weekend or a legal holiday, the period continues to run until the end of the next day upon which

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the court conducts business, i.e., not a weekend or legal holiday. *See* Fed. R. Bankr. 9006(a)(1)(C).

In determining what the "next day" is, there are two traps for the unwary. If the deadline for a filing is determined by counting *backwards* from the date of trial (e.g. "thirty days prior to trial"), the "next day" is the next *previous* business day. See Fed. R. Bankr. 9006(a)(5). By way of further explanation, if you are calculating a deadline of any number of days prior to trial and the deadline falls on a Sunday, the deadline for FRCP 26(a)(3) disclosures is the Friday **before** that Sunday, rather than the next Monday (assuming that Friday is not a holiday). This is because when the deadline falls on a Sunday, you *continue to count backwards* until the next business day. *See* Fed. R. Bankr. 9006(a)(5).

What even seems to shock seasoned practitioners is that where a specific date for a filing has been expressly set by Court order and that day happens to be a Saturday, Sunday or holiday, *the "next day" rule does not even apply, since it is only applied where a time period is "computed*." Therefore, the date set by the Court is the last date that such a filing may be made on a business day before the deadline. Fed. R. Bankr. 9006(a). The rules surrounding these "traps for the unwary" are commonly misunderstood, and although our judges have not made a practice of punishing attorneys for minor infractions, it is better to be safe than sorry and to honor these rules as a practice rather than "in the breach."

Of course, the deadlines discussed above are governed by the applicable procedural rule, Rule 9006, but it is noteworthy that all such deadlines are subject to change pursuant to Court order. This is yet another illustration of the importance of knowing and understanding the judge's pretrial orders, and any amendments to them.

**DISCLOSURE OF WITNESSES AND EXHIBITS**

Pursuant to the Federal Rules of Civil Procedure (FRCP) Rule 26(a)(3)(A), each party must disclose the names of witnesses and identify the exhibits that they expect to present at trial. These disclosures must be made at least thirty days prior to trial. Fed. R. Civ. P. 26(a)(3)(B). The exhibit lists must provide a brief description of each exhibit. The witnesses and exhibits must be identified as one of two separate categories: those that the party expects to present or offer and those that the party may call or offer if the need arises. There is one important caveat: exhibits intended to be used solely for impeachment need not be listed.

For strategic purposes, if you know that an exhibit will only be used for impeachment, it is usually best to exclude the exhibit from your exhibit list. This prevents the opposition from preparing an explanation for the substance of the exhibit prior to trial, and increases the impact of the exhibit. It creates unpredictability for the witnesses of opposing counsel and may throw an uncooperative or hostile witness off-balance. It also can be used to great effect in controlling a difficult witness and establishing your ability to test and bring into doubt the witness' credibility.

Every document or other exhibit must be pre-marked in the order of its possible presentation at trial. In more complex cases, however, this may prove virtually impossible. Each document or exhibit must have a separate exhibit number. The Local Rules prescribe a preordained numbering scheme. The moving party or plaintiff should number exhibits 1, 2, 3, and so on while the opposing party should number exhibits 101, 102, 103, etc. *See* LBR 5072-1(c)(2). If a party is submitting more than eight exhibits at trial, the party must organize the exhibits in a binder, separate each exhibit by tab, provide a clear table of contents, and sufficiently label the binder on the front or the spine. *See* LBR 5072-1(c)(3).

The clearer you are in identifying and labeling your exhibits, the easier it will be to present your case at trial. Ordering the exhibits in the logical flow of your case creates fluidity while at trial, provides an appearance of deep knowledge of your case, and helps the court focus on the facts of the case, rather than the difficulties of working through each exhibit.

The court has the discretion to exclude from evidence exhibits that do not conform to LBR 5072-1, and the court may also sanction attorneys for failure to comply with these provisions. In addition, if a party fails to disclose any witnesses or information required by F.R.Civ.P 26(a) or (e), the undisclosed witnesses or information **will not be permitted at trial** unless the failure to disclose was harmless or the party can show substantial justification. Regardless of the issue of sanctions, the last thing any attorney wants is the delay of trial due to his or her own failure to be knowledgeable of and adhere to the these procedural rules.

The First Circuit has consistently precluded witnesses or witness reports when a party fails to comply with Fed. R. Civ. P. 26(a). *See* Santiago-Diaz v. Laboratorio Clinico y de Referencia del Este, 456 F.3d 272, 276-79 (1st Cir. 2006) (granting defendant's motion in limine to preclude plaintiff's expert witness because the plaintiff failed to disclose the witness in a timely manner and had consistently failed to meet deadlines); Gagnon v. Teledyne Princeton, Inc., 437 F.3d 188, 197 (1st Cir. 2006) (although remanded for more complete findings, concurring with the district court's preclusion of plaintiff's witnesses after the plaintiff missed the deadline to disclose due to what the district court called a "miscalculated strategy"). Failure to disclose a witness has been found harmless, however, when the potential witness is known to all the parties; the witness is already listed by the adverse party; or the witness is going to testify on behalf of a *pro se* litigant who was not aware of the disclosure requirement. Teledyne Princeton, *Id*. at 197. The better practice here is to be over-inclusive when filing your

disclosures in order to ensure that you are preserving your right to call a potential witness or use a particular exhibit.

Parties must provide the court with two extra copies of any exhibit, in addition to the original, that the party expects to use to question witnesses during trial. You must also provide a copy of the exhibits to each party in the litigation. It may sound simple, but be sure to bring enough copies to provide to all parties when attending the first day of trial.

**DISCLOSURE OF RECORDS OF BUSINESS ACTIVITY**

At least thirty days before the date of trial, the parties must disclose any records of regularly conducted business activity under Federal Rules of Evidence 803(6) that the parties intend to present by certification rather than by testimony of a foundation witness. Presentation of records by certification instead of by testimony of a foundation witness is permitted by Federal Rules of Evidence 902(11) and 902(12).

If you intend to utilize your ability to certify records under Rule 803(6) you should consider the requirements of the rule far in advance of trial and disclose these documents and your intent well in advance. Certifying records in this way avoids the need to put a witness on the stand merely to lay a foundation for the business records. Moreover, identifying those exhibits that can be certified and timely disclosing these documents allows you to avoid calling yet another witness, and saves the court time and your client time and money. As a practical matter, these records will be disclosed along with your exhibit and witness list, as they almost always share the same deadline in the scheduling order. Be sure to review the rule for the substance of the certification that you must have since more often than not the deponent will not provide it in proper form.

## PRETRIAL STATEMENTS

Generally, the parties have until seven days before the final pretrial conference, or the date of trial if there is no final pretrial, to file a final pretrial statement. Or course, this statement has the usual caveat, i.e.,"unless otherwise ordered by the Court." Look to New Hampshire Local Bankruptcy Rule 7016-2 for the specific contents required to be included in your pretrial statement.

A pre-trial statement must contain a brief statement of the case. It must also include complete written stipulations of all contested and uncontested facts, the applicable law and any disputed issues of law, or separate statements of the same by each party if counsel cannot reach a consensus. This requires counsel to communicate in an attempt to come to an agreement as to the facts and legal issues. When the parties can work together to come to such an agreement, they can provide the court with clearly defined issues to be presented at trial. This allows the judge to focus on the essential issues of the case, making it easier for both parties to present a more clear case at trial. However, in complex cases, this can prove too time consuming and difficult and although efforts should be made to come to agreement, counsel needs to be prepared to file his/her own statements in a timely fashion.

A written waiver of claims or defenses, if any, must also be included, as well as a list of all depositions which may be read into evidence and a statement of any claim for attorneys' fees, with citations to the statutory and/or regulatory authorities relied upon as the basis for the claim, should also be included. Finally, the pre-trial statement must contain an estimate of the length of trial.

If the case is continued after the parties file final pretrial statements, the parties will be responsible for either updating their statements or filing a stipulation that no change is necessary no later than seven days prior to the new final pretrial conference or the continued commencement of trial.

**OBJECTIONS TO EXHIBITS AND TO MOTIONS *IN LIMINE***

Pursuant to the Federal Rules of Civil Procedure Rule 26(a)(3) and LBR 7016-2(d), objections to exhibits and to motions *in limine* must be filed in writing and with a copy to the Court no later than two days prior to the trial date. Note that the deadline for the motions themselves is generally set in the pretrial order pursuant to LBR 7016-2(c). The parties must identify the exhibit by number and state with specificity the grounds for any objections. Specific reference to a rule of the Federal Rules of Evidence, if applicable, should be included. It is best to work with opposing counsel and provide each other with the exhibits expected to be used at trial with ample time to review and determine your objections. Any objections not disclosed in accordance with F.R.Civ.P. 26(a)(3), LBR 7016-2, or a court order **will be deemed waived** unless good cause can be shown. This excludes objections made under Rules 402 and 403 of the Federal Rules of Evidence. Therefore, objections on the grounds of relevance or undue prejudice are preserved. Since it is often unclear prior to trial whether the opposition will have the ability to lay a proper foundation for the admission of a particular exhibit, as a practical matter, it also is best to reserve the right to object to any exhibits based on foundational issues.

All objections filed prior to trial will be ruled upon at the time of trial. The judge may rule on objections prior to the start of trial if there are few objections to rule upon. However, if

there are several rulings required, the judge may rule at the time the exhibit is offered during the trial in order to proceed with the substance of the trial and avoid undue delay.

**FINAL PRETRIAL CONFERENCE**

A final pretrial conference may be scheduled by the court, and such conferences will adhere to FRCP 16 and LBR 7016-3. The purpose of the final pretrial conference is to formulate a trial plan and facilitate the admission of evidence. Fed. R. Civ. P. 16(e). The court will hold the final conference as close to the start of trial as is reasonable. At least one attorney of record must attend for each party. *Id.*

Pursuant to LBR 7016-3, the court may consider the following issues at a final pretrial conference:

- Evidentiary problems, including admissibility of exhibits, motions in limine, expert witnesses, and elimination of cumulative evidence;
- Order of presentation, order of witnesses, etc.;
- Contested issues of law;
- Stipulations of uncontested fact;
- Settlement possibilities;
- Length of the trial.

*See* LBR 7016-3(c). Furthermore, at a pretrial conference, a party objecting to a statement from videotaped testimony must provide the court with a transcript of the objectionable statement. *See* LBR 7016-3(d).

Adherence to the requirements of these rules and the court's orders will avoid embarrassment for counsel and potential issues with clients. Just a few minutes spent reviewing

the issues addressed above can also save you, your clients and the court hours of delay, and will contribute to your good reputation as a trial lawyer.